IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 7947 of 1999

with

SPECIAL CIVIL APPLICATION No 7994 of 1999

For Approval and Signature:

HON'BLE MR.JUSTICE H.K.RATHOD

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

KOKILABEN R GOL

Versus

DDO

Appearance:

1. Special Civil Application No. 7947 of 1999

MR PARESH UPADHYAY for Petitioner No. 1

MR HS MUNSHAW for Respondent No. 1

RULE SERVED BY DS for Respondent No. 2

CORAM : HON'BLE MR.JUSTICE H.K.RATHOD

Date of decision: 30/09/2003

COMMON ORAL JUDGEMENT

#. Heard learned advocate Mr.Paresh Upadhyay on behalf of the petitioners and learned advocate Mr.H.S.Munshaw for respondents.

Since both petitions based on the identical facts and questions, they are heard together and are being disposed of this common judgment.

#. The facts giving rise to the both these petitions are narrated as under :

The facts pertaining to Special Civil Application No.7947 / 1999 in respect of Ms.Kokilaben R. Gol are as under :

That on 18.9.1991 the respondent authorities gave an advertisement for recruitment on the post of Mukhya Sevika and the pay scale prescribed was Rs.1400-2300. In response to the said advertisement, the petitioner had applied for the said post and after due process of selection, the petitioner came to be selected on the said posts. On 12th February, 1992 the petitioner was appointed as Mukhya Sevika in the pay scale of Rs.1400 -2300 and thereafter, the petitioner has remained continued to draw the salary in the pay scale of Rs.1400-2300 and annual increments as per the Rules. Thereafter, pursuant to the revision of pay in the year 1998, the pay scale of Rs.1400-2300 has been revised as Rs.4500-7000 with effect from 1.1.1996 and the petitioner has been given the said pay scale of Rs.4500-7000 as per Rules and the annual increments are also given to the petitioner. On 1st October, 1999, as the petitioner has singed her pay roll and received her pay and pay slip and thereafter, the petitioner was served with an order dated 18th September, 1999 whereby the pay of the petitioner is ordered to be reduced from Rs.5250 to Rs.4800 and even the pay scale of the petitioner is also reduced from Rs.4500 - 7000 to Rs.4000 - 6000 on the ground that the petitioner is not entitled to the pay scale of Rs.1400 2300 but was entitled to the scale of Rs.1320 - 2040. The said reduction has been made effective retrospectively from initial appointment of the petitioner. In pursuance of the said order dated 18th September, 1999, the authorities have calculated the recovery of Rs.23,436/- which is ordered to be recovered in the monthly installment of Rs.1000/-. The first instalment of Rs.1000/- towards recovery has been effected from the pay of September, 1999 which was given

on 1.10.1999 and thereafter only, the impugned order was served upon the petitioner. However, it is case of the petitioner that the petitioner was not given any opportunity of hearing before passing the impugned order and even according to the petitioner, said order dated 18th September, 1999 was not served upon the petitioner till the recovery is effected on 1st October, 1999. Therefore, present petition is filed challenging the order dated 18th September, 1999 and recovery purported thereof.

So far as Special Civil Application No.7994 / 1999 is concerned in respect of Ms.Madinabibi M. Malek, the brief facts are almost similar but the difference between two cases is, the date of appointment in the present case is 19th August, 1992 and the last salary on date 18th September, 1999 in the present case is Rs.5125/- which came to be reduced to Rs.4800 and the amount which is sought to be recovered is Rs.21,343/-. Except this, virtually there is no much difference in the facts of both these petitions as the impugned order in both the petitions came to be passed on the very day 18th September, 1999 giving reduction in the pay scale in the basic salary and the recovery thereof without giving any reasonable opportunity of hearing to the petitioners.

#. In both these petitions, the petitioners have produced relevant record, for that, the respondents have no much dispute. Affidavit-in-reply has been filed by the respondents in both the cases by one Shri R.K.Pathak, IAS, District Development Officer, Ahmedabad District Panchayat. The main contention of the respondents is that the petitioner was recruited as Mukhya Sevika pursuant to the recruitment procedure followed by the Gujarat Panchayat Services Selection Board at Ahmedabad. According to the respondent, the petitioner was holing qualification of S.S.C. and was not a Graduate which apply in both the cases. The respondent has pointed out that post of Mukhya Sevika having two pay scales prescribed by Panchayats and Rural Housing Department of the State Government namely Rs.425-700 for the Graduate and Rs.380 - 560 for SSC and others. That said pay scales are revised by the Finance Department through a notification dated 1st June, 1987 to Rs.1400- 2300 for Graduates and Rs.1320 - 2040 for others. Therefore, contention which has been raised by the respondent for the benefits of initial scale or appointment in the scale of Rs.1400 - 2300 was the mistake on the part of the respondents because the respondent has not considered the fact that the petitioner was only S.S.C. and not a graduate candidate. The resolution dated 9th February,

1998 which has been annexed to the present petition which is produced at page.26 of the petition wherein Item-71 of the Resolution dated 10th June, 1987 is quoted as under:

Sr. No.	Designation	Existing scale of pay	Revised Scale of pay	Remarks
1.	2.	3.	4.	5.
71.	Mukhya Sevika /Lady Social Education Organizer / Supervisor [Integrated Child Development Scheme] Extension Officer [Women and Children].	425-700 380-560	[i]1400-2300 [ii]1320-2040	[i] For Graduates [ii] For others

#. This scale has been revised in pursuance of the Government Resolution dated 9th February, 1998 which is at page.42. The pay scale of Rs.1400-2300 has been revised at Rs.4500-7000 and pay scale of Rs.1320-2040 is revised at Rs.4000-6000 as per Item No.69, which is referred as under :

Sr. No.	Designation	Existing scale of pay	Revised Scale of pay	Remarks
1.	2.	3.	4.	5.
69.	Mukhya Sevika /Lady Social Educa-tion Organizer / Supervisor [Integrated Child Development Scheme] Extension Officer [Women and Children].	[i] 1400-2300 [ii] 1320-2040	[i] 4500-7000 [ii]4000-6000	For Graduates For others

#. According to the respondent, as per the attached

document, this mistake has been brought to the notice of the District Development Officer by the Audit Department of Local Fund Account, Ahmedabad in report dated 6th September, 1999 and on that basis, the impugned order dated 18th September, 1999 has been passed by the respondent. It is not disputed by the respondent that before passing of the impugned order dated 18th September, 1999, no reasonable opportunity was given to the petitioners and even before passing recovery orders also, no opportunity was given to the petitioner.

#. Learned advocate Mr.Paresh Upadhyay for the petitioners submitted the petitioners had submitted application in response to the advertisement issued by the authority wherein the scale prescribed was Rs.1400-2300 and at that occasion, there was no such distinction and difference of these two scales for graduates and others, which is as contended by the respondents now. He also submitted that in response to the application submitted by the petitioners, both the petitioners were interviewed by the committee and ultimately they had been selected and have been given appointment order and even in the appointment orders, the scale prescribed was Rs.1400-2300. Therefore, according to his submission, now such contention raised by the respondent is barred by the principle of promissory estoppel. He also submitted that it is not a mistake or fault on the part of the petitioners inasmuch as even in the advertisement, applications were made by the petitioners and they have been selected by the Committee and ultimately, they have been given appointment order for the post of Mukhya Sevika in the pay scale of Rs.1400-2300. Therefore, now after a period of eight years, such mistake cannot be corrected by the respondents which having adverse effect in the status, position and also on the retirement benefits. Therefore, according to the learned advocate Mr.Paresh Upadhyay, now after this much long period, such mistake cannot be permitted to be rectified by the respondents. Learned advocate Mr.Paresh Upadhyay has also pointed out that so far recovery aspect, the view taken by the Apex Court as well as Division Bench of Court, that when there is no fault on the part of the employee and the order having retrospective effect resulting into recovery, such recovery cannot be effected when the employee is not at all at fault. The Division Bench of this Court has observed that it amounts to punishment to such employee. Therefore, learned advocate Mr.Paresh Upadhyay has submitted that respondents are not entitled to recover any amount as mentioned in the order passed by the respondents.

#. Learned advocate Mr.H.S.Munshaw submitted that there is no dispute that it was mistake on the part of the respondents but he explained how the mistake occurred in case of the petitioners. It is contended that these two petitioners have been transferred from two different district viz. Kheda and Amreli respectively at Ahmedabad District Panchayat and therefore, they have not been appointed right from beginning in Ahmedabad District Panchayat but since they have been now posted on the establishment of Ahmedabad District Panchayat, the respondents have proposed action against the petitioners. He also submitted that this mistake was not committed by the establishment of Ahmedabad District Panchayat but at the time of appointment of these two petitioners, their respective establishments viz. Kheda and Amreli District Panchayats had committed mistake while giving them the pay scale which is entitled to the Graduates but in fact both these petitioners do not fall in the category of graduates but they belong to the category other than graduates having qualification of S.S.C. and thus, it created the difficulty and now since the Audit Department having objection based on the Government Notification and therefore such mistake requires to be rectified and corrected by the respondent Department, otherwise, as per his submission, both these petitioners will wrongly get salary in the higher scale of Rs.1400-2300 [before revision] which is in fact not entitled to the petitioners. He, however, submitted that the petitioners in fact entitled the pay scale of Rs.1320-2040 [before revision]. It is also contended that the action of giving the wrong pay scale to the petitioners, creates discrimination amongst similarly situated employees and therefore, mistake if it is committed by the Department, the same cannot be perpetuated by the Court orders. Therefore, he submitted that when the mistake is justified before the Court by placing on record two notifications dated 10th June, 1987 and 9th February, 1998 and the letter of the Audit Department dated 6th September, 1999, it is sufficient to justify the mistake and also justify the request to correct the same. However, learned advocate Mr.Paresh Upadhyay is not disputing this aspect that as per notifications, scale for the post of Mukhya Sevika who are not graduate, not entitled to the pay scale of Rs.1400-2300 [before revision]. In light of above, the facts are not in dispute between the parties. But the question for consideration of this Court that if the respondent is allowed and permitted to rectify the mistake committed by them, then what about the last salary drawn by the petitioners till the time when the order dated 18th

September, 1999 came to be passed by the respondents. On the other hand, if the Court is not permitting to rectify the said mistake, then it would amount to perpetuity of mistake and the same would be contrary to the notifications at the instance of the Courts' order. Therefore, considering all these aspects of the matter, according to my opinion, when mistake is apparent and the correct scale requires to be based on the Government Notification and when said mistake is corrected by the respondents on the basis of the Audit Objection and especially there is no malafide and / or allegations made by the petitioners against the respondent, then in such circumstances, if impugned order dated 18th September, 1999 is required to be rectified to the extent that whatever the basic salary in respect of the petitioners at the relevant time when the impugned order in question passed by the respondent i.e. Rs.5250 in case of Smt.Kokilaben R. Gol and Rs.5125/- in case of Smt.Madinabibi M. Malek deserves to be protected by this Court in the interest of justice and the respondent is allowed to fix their basic pay in scale of Rs.4000-6000 in proper place and thereafter, the petitioners are held to be entitled to get increments for subsequent years in the pay scale of Rs.4000-6000, will meet the ends of justice between the parties in the facts and circumstances of the case. Therefore, considering all these aspects of the matter, in my opinion, when the respondents having power to correct the mistake which is based on the Government Notification but simultaneously it should not create such adverse situation for the petitioners so that ultimately they will have any loss of huge financial loss and / or financial benefits at the time of retirement from service. Therefore, bearing in mind these two aspects of the matter, if the impugned order dated 18th September, 1999 in both the cases, is modified to the extent discussed above, will meet the ends of justice.

#. Learned advocate Mr.Paresh Upadhyay, however, on the aspect of recovery, pointed out that because of the order dated 18th September, 1999 whereby scale has been reduced and basic salary also reduced by the respondents and he placed on record two xerox copies of the pay slip in respect of both these petitioners and relying on the said pay slips, submits that from 1999 onwards, after reduction of basic salary, both the petitioners are entitled to regular increments atleast in the scale of Rs.4000-6000 till current year. He, however, contended that in case of both the petitioners, the basic salary is fixed at Rs.4800/- and as such, no increment has been released by the respondents in favour of the petitioners.

Therefore, his submission is after protecting the pay of the petitioners which was received by the petitioners on 18th September, 1999, the respondents may be directed to release the increments in favour of the petitioners in the pay scale of Rs.4000-6000 for the period from 1999 to 2003.

#. However, on the aspect of recovery, it may be appreciated that undisputedly the respondents have not given any opportunity of hearing to the petitioners. The said recovery is purported to be effected from retrospective effect. It is also not disputed that because of rectification of the mistake by reducing the scale of the petitioners from Rs.1400-2300 [before revision] to Rs.1320-2040 [before revision] to Rs.4000-6000, in my opinion, the recovery cannot be effected from the employee especially when there is no fault lie on the part of the employee and as such when there is no allegation of fraud or dishonesty on the part of the employee. It may be further noted that it is not case of the respondents that said benefits has been taken or obtained or granted by the respondents on the basis of fraud or misrepresentation or any misdeed which can be attributed to the concerned petitioners. Therefore, benefit which has been granted by the authority without any fault on the part of the petitioners, in such circumstances, view taken by this Court in case of M.M.PATEL V. STATE OF GUJARAT reported in 2003[1] G.L.H 697 is relevant. The relevant observations made by the Division Bench of this Court keeping in mind the decision of the Apex Court in above decision is referred as under :-

"5. Mr.Supehia, learned advocate for the petitioners has contended, inter alia, that the issues in these petitions are covered by the judgment of the Division Bench of this Court dated 4.4.2001 in LPA No.587 / 2000 in SCA No.2196 / 1999. He further submitted that even the Apex Court in the mater of P.H.Reddy v. N.T.R.D. reported in 2002 [2] SLR 694 has taken the similar view. He submitted that as per the aforesaid decision once the higher pay scale was fixed and the amount is paid to the employee, thereafter, if subsequently said decision is cancelled or revoked, recovery cannot be effected.

8. In case of I.C.Patel [supra] the Division Bench of this Court observed as under :

"The mistake was committed by the Board for which the appellant should not be penalised. Recovery of excess payment made to the appellant for no fault on his part appears to be wholly unjustified."

In case of P.H.Reddy [supra] the Apex Court also found that the order of fixation passed by the appropriate authority does not require any interference. Still, however, the Apex Court observed as under :

"The employees-appellant, who had been in receipt of a higher amount on account of erroneous fixation by the authority should not be asked to repay the excess pay drawn, and therefore, that part of the order of the authority is set aside."

10. In view of the aforesaid discussion, all these petitions succeed. The impugned orders of recovery of amounts which are challenged in respective petitions are quashed and set aside and the petitions are allowed to the aforesaid extent. It is made clear that if any amount of retiral benefits is withheld on account of the impugned decision of recovery of amounts, same shall be released forthwith in accordance with law. Rule is each petition is made absolute accordingly. There shall be no no order as to costs."

Even in a recent decision in case of GANESHA BASTI, BATHINDA V. STATE OF PUNJAB AND OTHERS reported in 2003 Lab.I.C. 1029, the relevant observation is quoted as under :

"The recovery is sought to be effected without complying with the principles of natural justice and giving an opportunity of hearing. The recovery could be set aside on this short ground alone. However, we have gone through the order to find out the justification in passing the impugned order. The pay of the petitioner was stepped up by the respondents without any misrepresentation on the part of the petitioner. Learned counsel for the petitioner has relied upon Sahib Ram v. State of Haryana, 1995 [1] SCT 668 [1995 AIR SCW 1780] to contend that the recovery cannot be effected if there is no misrepresentation on the part of the petitioner."

##. Therefore, considering the ratio laid down in the aforesaid cases, according to my opinion, orders of recovery with retrospective effect which is not based on the fraud, misrepresentation or fault on the part of the petitioners, requires to be quashed and set aside.

##. In the result, both these petitions require to be allowed partly and the same are allowed partly accordingly. The order dated 18th September, 1999 impugned in both these petitions are modified to the effect that the respondents shall protect the basic salaries of the petitioners respectively which was received by them at the time of passing of the impugned order on 18th September, 1999, in other words, respondent shall protect the basic salary of Rs.5250 in case of Smt.Kokilaben R. Gol and Rs.5125/- in case of Smt.Madinabibi M. Malek. The respondents are further directed to fix the basic pay of the petitioners in the pay scale of Rs.4000-6000 at proper placement and shall release all due increments in the pay scale of Rs.4000-6000 till the current year in favour of both the petitioners within one month from the date of receipt of copy of this order. The respondents are also directed not to recover any amount from the salary of the petitioners pursuant to the impugned order dated 18th September, 1999 and even if some recovery is effected and any amount is recovered from the petitioners pursuant to the impugned order dated 18th September, 1999, the same amount of recovery shall be paid back to the petitioners within two months from the date of receipt of copy of this order.

Both these petitions stand allowed partly. Rule is made absolute to the extent indicated above with no order as to costs.

Date : 30.9.2003 [H.K.Rathod, J.]

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